No. 2712

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL OESTING,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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By.....Deputy Clerk.

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The brief submitted in behalf of the Government devotes considerable space to a citation of authorities designed to show that the plaintiff in error cannot, for the first time in an appellate Court raise the question of sufficiency of an indictment.

It would seem as if the principle that a complaint "which does not state facts sufficient to constitute a cause of action" or "sufficient to constitute a public offense", cannot support a judgment of any kind, is so elementary as to need no citation of authority in support thereof; and that advantage may be taken of such defect "at any stage of the proceeding".

This rule has been modified, in some respect, by statutory enactment in some of the states, and it

is to cases arising under this modified rule that the attorney for the defendant in error has gone for authority in support of his contention.

An inspection of these cases will show that the general principle has never been violated. An analysis of such citations of authority in the brief of the defendant in error discloses that the Government's attorney misunderstands the reasoning of these cases.

In Boos v. State, 105 N. E. 117, although the indictment was held good the Court seemed to be of the opinion that even where there is a statute to the effect that the insufficiency of the indictment cannot be first raised on appeal, still it can be first claimed on appeal that the indictment does not state an offense. The cases cited in this decision seem to take the same stand, without absolutely deciding upon it.

Atkinson v. State, 33 Ind. App. 87; 70 N. E. 560, Held:

> "An indictment *may* be thus attacked by the defendant for the first time on appeal, but such attack will not prevail, *except* where there is an omission in the indictment of some criminal charge; and the *mere want of certainty* in the statement of the facts constituting an offense cannot be grounds for so questioning the indictment."

Edina v. Beck, 47 Mo. App. 234: Here defendant was fined fifty dollars in the Mayor's Court for being drunk and disorderly and resisting an officer.

The transcript showed "* * * a valid charge, plea and judgment".

> "* * * the conclusion follows that the appeal was properly dismissed, unless we can hold that a party may appeal from a judgment *properly* entered against him, upon his plea of guilty, which is in effect a judgment by confession. This we cannot hold * * *"
>
> "* * * This does not give the defendant a right to appeal from a judgment where there is nothing to be tried by the appellate court * * * A defendant cannot plead guilty and when the fine imposed is greater than he expected, try to withdraw his plea of guilty upon appeal."

N. B.—The constitutional amendment relating to necessity of indictment or presentation refers only to crimes which are infamous, i. e., felonies.

Briones v. State, 105 Ark. 82; 150 S. W. 416: The complaint is not that the indictment does not state an offense, but that it charges the same offense in two different ways, to wit, the entering of a house for two purposes, one to commit rape and one to commit grand larceny.

State v. Arthur, 10 La. Ann. 265: Here the objections were as to the formal defects and not that the indictment did not set forth an offense.

State v. Lubin, 42 La. Ann. 79; 7 So. 68: The case of State v. Arthur is referred to with approval on one point and ignored when the question of application to a case where no crime was charged came into consideration. In State v. Lubin, the Court below had held that an objection to an indictment for

extortion which failed to state that accused held an office, "was one of form and not of substance, and that therefore, the objection came too late after the jury had been impaneled", Held:

> "Under the statute it is too clear for argument that one who is not a 'judge, justice of the peace * * * or other civil officer' *cannot* be guilty of oppression under the color of his office * * * "
>
> "It is thus apparent that the information lacked an essential ingredient, without which *no crime was charged* and no conviction could legally be obtained."
>
> *"We are clear in the conviction that the omission was not of the kind which is cured by joinder of issue and verdict."*

Ter. v. Garland, 6 Mont. 14; State v. Malish, 15 Mont. 506: The attorney general neglected to state that the section of the Montana act, partially set out in his brief, further provides as to the objection requiring jurisdiction or that the indictment does not set forth an offense. The provisions is that "these he may take advantage of on the trial, or on motion to arrest judgment". Held:

> "The *statute* having provided the method of procedure to take advantage of such a defect, that method must be pursued."

We are not interested in the point decided in People v. Moran, 161 N. Y. 657; 57 N. E. 1120. It is there held that

> "the indictment was sufficient to charge the defendant of the commission of a crime".

Thereafter the Court goes on to say, as a mere expression of opinion, having no bearing on the decision of the case, that

> "* * * *as there was evidence sufficient to sustain a finding of the jury* that the crime charged was committed, the defendant should not be allowed on appeal for the first time to raise a question as to the sufficiency of the indictment."

There is not even a claim made in that case that it did not state a public offense; as a matter of fact it did state a public offense, and had there been any uncertainties, they were supplied by the evidence. Supposing that case to decide that where an indictment does not state a public offense, the deficiencies may, in the absence of objection, be supplied by evidence, we cannot see its application here. We might admit such a proposition without affecting our contention in this case, and we can see where there might be some reason to support such a rule; but we cannot see how one can be sentenced to jail for a crime which he has neither confessed nor been shown to have committed. If one can be sentenced for the commission of a crime actually proved to have been committed by him, it does not follow therefrom that he can be sentenced for a crime which there is nothing to show that he has committed and which he has not been accused of; the indictment in both cases being the same, in the one case, the man has actually committed a crime and might not be allowed to object to the fact that he has been accused of it partly through an indictment

and partly through evidence, but in the other case he has not been accused of the crime at all and has not been shown to have committed it.

In Tway v. State, 50 Pac. 188, it is held:

> "The alleged defect being *in the manner in which the offense was charged* the objection should have been made * * * in the court below * * * but the information is in the language of the statute and is sufficient."

We do not claim that where a public offense is charged, objection can be made *in the manner in which it is charged* for the first time on appeal.

In Church v. Territory, 91 Pac. 721, it is assigned as error that the Court erred in overruling defendant's motion in arrest of judgment. No demurrer or motion to quash was filed. The appellate Court held:

> "That *where there was a clerical mistake* in an indictment for a *misdemeanor,* defendant cannot raise the point for the first time upon motion in arrest of judgment, he should demur or move to quash."
>
> "As to whether the omission of the word 'did' as in the indictment in this case, would be fatal or not we do not decide, but *as the charge is a misdemeanor only,* and the punishment assessed a fine of fifty dollars and costs, we are of the opinion that the Court did not err in overruling the motion in arrest of judgment."

In this case there is only a matter of a clerical error and it is held that in a case of *misdemeanor* such an error can only be objected to in a certain way. The case of a misdemeanor is especially dis-

tinguished from that of a felony—State v. Halder, 2 McCord (S. C. 377), being referred to as showing that in the case of a felony the same error would have been fatal and the judgment arrested.

In the case of Palmer v. State, 118 S. W. 1022 (Tenn.), it is claimed that the indictment was insufficient because a certain word was not used, although the full crime is charged in the words of the statute. The Court holds:

> "Objections made to the indictment must be made in the lower Court."

And in the next paragraph:

> "Objection to the *form* of the indictment are *generally* waived, by going to trial without calling the attention of the trial judge to them."

The Court goes on to state that the general demurrer has been abolished by the Tennessee code, and further that the indictment as a matter of fact is a good one,

> " * * * even if the objection * * * had been made in the Court below, in ever so specific a form, it must have been held of no avail."

McQueary v. People, 110 Pac. 210: A motion to quash indictment was in this case denied. On appeal it is claimed, that the motion should have been granted for the reason that indictment charged both a statutory and common law offense. The Court Held:

> " * * * that the reason often announced that a question not raised below *which may be waived,* will not be considered on review, the

> defendant is estopped from presenting it here. But, aside from this, the information is not open to the attack made."

It is apparent that the Court in this case considered that certain matters may not be waived upon failure to object to them before appeal; but that an objection which is a ground of special demurrer and not of general demurrer is waived by not raising it before appeal.

State v. Smart, 110 Pac. 715, did not touch the points at issue at all; all points raised in the Supreme Court were raised in the lower Court by demurrer, motion to quash and motion in arrest of judgment; but it was held that the points were not properly brought for decision in the Supreme Court but should have been decided by the District Court of Appeal and the case was sent by the Supreme Court to the District Court of Appeal to be there decided.

We are not interested in the matters claimed to have been decided in the case of Johnson v. State, 3 Ala. App. 98, as that case merely held that the point of uncertainty cannot be raised for the first time on appeal. This is true; but has no bearing upon the matter in hand.

In State v. Murkel, 83 A. 186 (N. J.):

> "The single defect in the indictment which is assigned before us * * * is the failure to aver in it the name of the person from whom the defendant solicted the bribe. * * * No *such* objection to the indictment as that now alleged before us was taken on the motion to

quash, and the statute is a bar to its consideration for the first time in a Court of review."

The statute referred to provides * * * :

"* * * Every objection to any indictment, for any defect of form or substance apparent on the face thereof, shall be taken by demurrer or motion to quash * * * before the jury shall be sworn, *and not afterwards.*"

The cases cited as a basis for the foregoing case indicate that where the objection is that "no crime was charged", even the statute does not prevent a consideration of the indictment for the first time on appeal (Mead v. State, 23 A. 264; and State v. Sharkey, 63 A. 866).

It is to be noticed in the above case that it is not decided what would have been the ruling had the objection been made that the indictment did not state a public offense. It is also to be noticed that in this case, as in every other case, cited by the Government, that the decision has been on another point than the proposition that the indictment does not state an offense. We believe that even did a statute provide that no appeal could be taken upon the point that the indictment did not state an offense, such a statute would be unconstitutional, for the reason that a man would be deprived of his liberty without anything to show that he had committed a crime; the constitutional question has never been raised in any of these cases, for the reason that in all of them it is

held that the indictment is in any event a good one, and does state an offense.

Check v. Commonwealth, 171 S. W. 998 (Ky.):

> "The indictment charges a public offense. It is merely insisted that the offense is imperfectly pleaded. * * * That being true, the sufficiency of the indictment cannot be considered when raised for the first time in this Court."

Pace v. State, 152 Ind. 343: The brief of the defendant in error quotes from the syllabus, and not from the decision. It is claimed:

> "The Court erred by holding defendant to trial upon an insufficient indictment."

Held:

> "Counsel for appellant, for the first time seeks to assail the sufficiency of the indictment under the second specification. It is manifest that this assignment, *as formulated,* presents us questions for our consideration. Barnett v. State, 141 Ind. 149."

The case upon which the decision is based holds as to an indictment that is attacked for uncertainty and other grounds.

> "There is no *contention* or objection, and none in our opinion could be successfully interposed upon that ground, that these pleadings * * * do not charge a public offense of which the Court had jurisdiction."

Southern Express Co. v. State, 114 Ga. 226: The indictment is not attacked on grounds that it did not state an offense, but it is claimed that de-

fendant, being a corporation, could not be indicted for the offense.

> "The defendant could have invoked a ruling of the Court to the effect that it could not legally be indicted for the offense charged, by demurring. * * * It was too late after voluntarily going to trial on the merits, to contend 'that a corporation * * * was not indictable under the section * * *,' * * * as no ruling of the Court below upon the validity of the indictment was legally invoked."

The Court cannot consider an assignment of error, based upon the failure of the trial Court to rule in accordance with the contention of plaintiff in error.

Davis v. State, 39 Md. 355: We are unable to find any such language as is quoted in the reply brief. The language is:

> "The errors assigned, if any, were subjects of demurrer or in arrest of judgment, and in this case there was neither. The code, Article 30, Sec. 82, prohibits reversal for any matter or cause, which might have been the subject of demurrer to the indictment."

No claim that a public offense was not stated; the objection as to the clearness of the statement and that the degree of murder, etc., were not stated.

Pickett v. U. S., 216 U. S. Supreme Court Report, 456, shows that it has no reference to an action of this kind. The words of the Court are as follows, to wit:

> "The third and fourth errors assigned are for overruling an objection made to the suf-

> ficiency of the indictment and to the admission of any evidence because the indictment was bad. No such objection is shown by the record. The indictment *is not in form bad nor vague, but charges the crime of murder with great particularity.* There seems to have been *no reason for doubt as to the crime charged;* besides objections *of this character* cannot be made upon a writ of error for the first time."

It appears then, that at the trial objections were made to the taking of evidence on the ground of the insufficiency of the indictment. The Court holds that "No such objection is shown upon the record" and that, being an objection to evidence it must appear on the record before it can be considered from the point of view that an error has been committed in the ruling of the Court upon the evidence. The Court then goes on, however, to consider the indictment; no reason is given for its consideration; but the only inference can be that, though the objection as to the admission of evidence might not be a good one, since it does not appear upon record, still, an objection on the same grounds to the judgment should be a good objection if the indictment does not state a public offense, and cannot therefore support the judgment. In other words, an objection to admission of evidence must appear on the record no matter upon what ground the objection is taken; but an objection to the judgment based upon the same ground, where the ground is that the indictment does not state a public offense, may be taken for the first time in the Court of Appeal.

Now the objection to the sufficiency of the indictment is held not to be a good objection for the reason that "The indictment is not, in form, bad nor vague, but charges the crime of murder with great particularity. There seems to have been no reason for doubt as to the crime charged". And here the Court tells us that no objection as to *bad form* or *vagueness* of the indictment can be taken for the first time on appeal. The Court does *not* say that *no* objection can be taken to the indictment for the first time on appeal, nor are we to understand that an objection that the indictment does not state a public offense must necessarily be taken before the appeal. The Court only says that the objection "cannot be made upon a writ of error for the first time" where it is made upon the ground that there is "reason for doubt as to the crime charged".

Our appeal is not made upon the ground that the indictment in this case is "in form bad or vague" or that there is "reason for doubt as to the crime charged", but our claim is that there is no crime charged at all; neither is our objection made to the taking of evidence, for, defendant, having pleaded guilty no evidence is taken.

There seem to be no authorities directly holding that a defendant can appeal under the Federal practice after a plea of guilty, upon the ground that the indictment does not state a public offense; but there are certainly no authorities to the contrary.

In the case of United States v. Bayoud, 16 Fed. 376, the Court takes it for granted and as an established fact that a defendant may appeal after plea of guilty, for, the defendant in that case *actually did* appeal and the Court *actually did* pass upon every point raised by his appeal. In that case the Court also tells us inferentially, that an objection that the indictment "fails to describe the various acts intended to be proved with that reasonable certainty which the law requires to constitute a valid indictment may be taken for the first time on appeal. The language of that case is as follows:

> "Here is not the place to object to the indictment because of the number of charges it contains. The accused, without objection open to them on this score is that the indictment fails to describe the various acts intended to be proved with that reasonable certainty which the law requires to constitute a valid indictment."

The attempted answer to our contention that the accusation is either against a corporation or an insane man is a mere begging of the question. On this we refer again to our opening brief.

There are several attempts to answer other portions of our argument. The changing of the wording and punctuation of the indictment, for instance, on page eight, line three of reply brief: It is stated that Dr. Oesting was to furnish treatment "without any *real* knowledge of the condition of the person," whereas the indictment uses the words

"without any proper knowledge of the real condition".

Also, about the middle of the same page, it is stated that Dr. Oesting was to have "no real or proper knowledge of such person's condition", whereas, the allegation, as a matter of fact is "That Dr. Oesting was to have 'no proper or professional knowledge of such person's condition' ". Even were the indictment in the language claimed in the brief it would still be defective, but these mis-statements show recognition on the part of the government's attorney of the fact that it cannot be denied that one who is a licensed physician has proper and professional knowledge.

Again on the same page, lines eleven and twelve, there is an attempt to change the meaning of the indictment by omitting a comma. It is there alleged that the medicine and treatment were not to be "skillfully and properly designed and prepared for the cure of the disease"; whereas, the language of the indictment is "that Dr. Oesting would send or deliver to each of said persons so sending or delivering to him sums of money, certain medicine or treatment not skillfully or properly designed, prepared, and of little or no value for the cure of the aforesaid persons". There is a considerable difference between sending medicine not properly designed for the cure of the disease, and sending for the cure of the disease, certain medicine not properly designed.

N. B. There is nothing said in any brief so far filed as to the distinction between medicine of "little" value and medicine of "no" value.

On page 9, line 3, note the same mis-statement of the use of *real* knowledge instead of proper and professional knowledge.

On lines 8 and 9 of page 9, the commas are again left out before and after the words "for the cure"

On line 20, page 9, it is stated that treatments by reputable physicians contemplate at least "good faith". We can find nothing in the indictment which seems to deny good faith. There is nothing in the indictment which shows that Oesting was to state that any person was afflicted with a disease, whereas, as far as he knew, or had reason to believe, the person was of sound health.

Durland v. United States, 161 U. S. 306.

> "* * * Contention * * * is that the statute reaches only such cases, as, at common law, would come within the definition of 'false pretenses', in order to make out which there must be a misrepresentation as to some existing fact and not a mere promise as to the future. * * * And then, as counsel say * * * 'it (the indictment) discloses on its face absolutely nothing but an intention to commit a breach of a contract. If there be one principle of criminal law that is absolutely settled * * * it is that fraud either in the civil courts or in the criminal courts must be the misrepresentation of an existing or past fact, and cannot consist of the mere intention not to carry out a contract in the future'

> "It (the statute) includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose. * * * And it would strip it of its value to confine it to such cases as disclose an actual misrepresentation as to same existing fact, and exclude those in which is only the allurement of a promise.
>
> "The question presented by this indictment to the jury was not as counsel insist, whether the business suggested in this bond was practicable or not. If * * * this * * * defendant * * * had entered in good faith upon that business * * * no conviction could be sustained, no matter how visionary might seem the scheme."

There is no contention on our part that the crime of mis-using the mail cannot be established by proof of a fraudulent scheme to do something in the future. Our claim is that "this class of case is akin to the prosecutions in State Courts for obtaining money by false pretense in which cases it has been held, in accordance with common sense, that it is not sufficient to allege fraud, but the scheme must appear to be fraudulent and of such a nature as to be calculated to cause one to part with his money", i. e., we cite the decision of State Courts on the point that it is necessary, as stated in the Government's brief, "to show its design and adaptability to deceive". It is not sufficient to say this scheme is fraudulent, the scheme must be of such a nature as to be designed to defraud and to be adaptable to fraudulent purposes. Where, as a

matter of fact, the statement of the alleged scheme shows that the scheme is honest and not intended to deceive, the allegation as to fraud of defendant is controverted in the indictment itself. We will say more on this point later.

Brooks v. United States, 146 Fed. 223.

The section read in the light of Durland v. U. S. and other cases contemplates any scheme of certain character "provided only it was designed and reasonably adapted to defraud."

> "The most successful schemes to defraud are those dressed in the garb of honesty and hedged about with all the appearance of legal and enforceable undertakings. If the intent and purpose is to deceive and defraud the unwary it matters not what form the project is made to take."

and

> "* * * the particulars of the scheme are matters of substance, and must be set out with sufficient certainty to show its existence and character, and to fairly acquaint the accused with what he is required to meet."

Citing:

United States v. Hess, 124 U. S. 483;
Stokes v. U. S., 157 U. S. 187;
Stewart v. United States, 119 Fed. 89;
Miller v United States, 133 Fed 337.

United States v. Loring, as cited in the Government's brief agrees with us.

In answer to the Government's statement that we do not seem to be able to find any case to sustain

our assertion that this indictment does not set forth a scheme to defraud, we might ask: Where are the Government's cases showing that the indictment does set forth a scheme? But we will not say this, because we believe that no such ridiculous attempt at an indictment has ever before been framed, and if it has been, we have too much respect for the ability of our Federal Courts to think that it could ever have passed as far as an appellate Court were any objection made below. We might further state that there are no two cases just alike and that we are looking for the statements of principle, not of facts.

The contention that the term "Dr" in the indictment before this Court, can mean anything or could have referred to anything but to a doctor of medicine, is too puerile for comment, even if it were not further alleged that Dr. Oesting represented that he was a physician, duly qualified and licensed to practice in the State of California, which allegation is nowhere claimed to have been untrue. It certainly cannot be claimed that the indictment alleges that he is not a doctor or physician.

On line five page twelve, we have more mis-statements as to the facts of the indictment. Nowhere in the indictment does it say that the defendant would furnish treatment "not knowing the real physical condition of the said patient". The allegations all through the indictment are that he did not have "proper or professional" knowledge. There is nothing said at all regarding physical condition.

We agree with the Government that it cannot be honestly contended that the allegation does not tend to negative the honesty of the pretenses.

MacKenzie v. Gordon, cited by the Government, is not in the least like the present case.

What the indictment in that case set forth we do not know, as no complaint is made to the indictment on the appeal; but we strongly suspect that, if the Oesting indictment was modelled upon it, either the model was considerably chipped during the journey to San Francisco or the Oesting facsimile was dropped and broken and some of the pieces lost; for the Court instructed the jury that the Government in the MacKenzie case was "charging" that defendant's assertions "* * * *were untrue;* that they were *known to be untrue* by the defendant; that he used the United States mails in further execution of this fraud * * *", and was also charging that the letters sent to defendant "showed no condition of disease; that the defendant knew that they showed no condition of disease * * * he led the persons * * * to believe that they were suffering with serious disease which he could cure; *that this was false; that he knew it to be false.*"

> "In another part of the charge he stated that the government was asserting that the defendant 'professed to cure certain diseases that he could not cure, and *which he knew he could not cure',* adding that if defendant's advertisement was false, 'and *known* to be *false* by the defendant, and he was attempting to gain money

> from persons upon this advertisement, and using the mails in execution of it, then a scheme to defraud exists.' ''

Miller v. U. S., 133 Fed. 337: We do not have to go outside of the Government's brief to find out how far this case is from sustaining the indictment against Dr. Oesting. The scheme was in its very essence fraudulent. The Court says:

> "They could not have committed the acts which they agreed to devise and to do without despoiling them."

Lemon v. U. S., 164 Fed. 953: Here also the scheme is "well designed and adapted to deceive" and is described with "sufficient certainty to show its existence and *character.*"

U. S. v. White, 150 Fed. 379: This is merely the report of a case in the *District* Court. Nor does it hold what the Government's attorney wants us to think it does. The indictment charges that the defendant's scheme was to advertise that he would, for cash, teach occult powers and furnish charms and the means for making charms which the prisoner intended to falsely pretend would have magical powers. That the pretence was false and fraudulent and that defendant knew "he could not and would not" (page 383) do the things represented. And so on, setting out the entire scheme. The instruction then, that is referred to is that the jury is concerned as to whether or not defendant "would" do as promised, not as to whether he "could".

There is no question raised as to the sufficiency of the indictment, nor as to the requisites of the scheme.

U. S. v. Young, 215 Fed. 267: Some of the defects of the Oesting indictment have been here foreseen, for the scheme set out is one to send remedies to persons who are not sick and not in need of those or any other remedies. The fraud is fully set out.

Rumble v. U. S., 143 Fed. 722: This case is covered by the comments on the other cases in the Government's brief.

Charles v. U. S., 213 Fed. 707: There must be *false* representations, and a reading of the case will show the necessity of the further element of knowledge.

Harrison v. U. S., 200 Fed. 662: We reserve a consideration of this case for the present, as we intend to use it further on.

At this time we must apologize for our frequent statements that a scheme to defraud must be a fraudulent scheme, for we have waked to the realization that the fraud must rather be "in the scheme"; that is, there must be a scheme within a scheme, a main scheme with an "underlying scheme". (The quotations are from Harrison v. U. S., supra.) To sell green cheese is a scheme to defraud if there is an underlying scheme to make use of the green cheese business to obtain cheese

for nothing by writing to farmers that we intend to pay for it, whereas we do not intend to give the farmers anything.

Nevertheless, we do not think that our time has been wasted, if the Court will consider that where we have said that no fraudulent scheme is shown, we mean that no fraud has been shown in the scheme, and that no fraudulent scheme has been shown as underlying the main scheme.

Just exactly what is necessary is set out in the above case of Harrison v. U. S., as follows:

> " * * * the statutory 'scheme to defraud' may be found in any plan to get the money or property of others by deceiving them as to the substantial identity of the thing which they are to receive in exchange; and this deception may, of course, be by implication as well as by express words. On the other hand 'the scheme' cannot be found in any mere expression of honest opinion as to the quality or as to future performance. There must be the underlying intent to defraud * * * It is true that the Durland case contemplates as within the statute 'suggestions and opinions as to the future': but necessary limitations on a too broad construction of this language are indicated in the Mac-Annulty case, 187 U. S. 94 * * * " (page 665).
>
> "The 'schemes' which have been punished have all smacked of the confidence game, of getting something for nothing, like selling worthless corporate stock * * * running a bucket shop under the pretence of doing real trading * * * running a fake marriage bureau * * * getting consignments without intent to remit * * * financial schemes impossible of performance * * * and the like. Schemes like those discussed in Harris v. Rosenberger

> * * * and in the cases it reviews, fall in this same class, because, though the representation affects quality or performance, it directly pertains to a fact or a plan inherent in the substantial identity—the essential characteristics —of the thing itself, and even though the original and underlying business is legitimate, the use being made of it is fraudulent'' (page 666).
>
> ''We do not fail to observe that in a prosecution of this character fraud need only be in the underlying scheme, and it is not necessary that the matter sent through the mail should itself contain fraudulent statements; but in this case the fraud in the scheme is predicated solely on the alleged false and misleading statements contained in the circulars, and hence they must be examined'' (page 667).

And referring to the particular case being discussed:

> '' * * * we find no sufficient basis for a charge of fraud in the advertising, nor any room for an uncertainty of intent therein which may be solved one way or the other; and as a *fraudulent scheme* in that respect is the basis of the indictment, the charge must fail, and there being no primary scheme, the accessory or supplemental scheme is not important.''
>
> (So as not to seem to be attempting to mislead, we must state that the supplemental scheme referred to in this last paragraph has no reference to the ''underlying'' scheme referred to before.)

The foregoing case was decided in 1912.

The indictment against Dr. Oesting does not show the fraud ''in the scheme'', the underlying fraudulent scheme. It alleges that the doctor conceived a

fraudulent scheme to eat cream cake and the mailing of a letter in execution of the scheme, but the very scheme negatives the fraud, unless he further alleges that the eating of the cream cake, and the mailing of letters to get cream cake were done to get free cake at the expense of the bakers who expected to get paid.

The indictment is nothing more than a charge that plaintiff in error has entered upon the unethical practice of his profession of medicine. If the accusation made against this plaintiff in error amounts to a crime, then every man engaged in the practice of the profession of medicine stands equally indicted, if not before the law, before the world.

An analysis of the salient points of the indictment (the facts constituting the offense, as distinguished from the general accusation of fraud) discloses that the plaintiff in error is charged with violating a Federal Statute because, forsooth, he has:

(a) Practiced his profession under a name other than his own (called himself Dr. Jordan);

(b) Unethically advertised his special qualification and ability to treat certain diseases;

(c) Sought interviews with his patients through the mails as well as by personal consultations.

(d) Made careless unskillful, improper or incorrect diagnosis of the ailments of his patients;

(e) Forwarded to his patients medicines "for the cure" of their ailments, not skillfully prepared, or not skillfully designed, or not "properly" prepared, or of little or no value for the cure of his patients;

(f) Accepted money for such service and such medicines.

The entire charge is equivalent to saying that he has violated the ethics of his profession and never should have been licensed to practice. It is an allegation of unprofessional conduct but not the statement of a crime. It is not a fraud to be negligent, careless or indifferent with your clients or your patients, while accepting fees for services rendered them.

It is rather an arraignment of one's unfitness to longer practice his profession; but not an accusation the truth of which is sufficient to land him in jail.

It is nowhere charged that:

1. Dr. Oesting was not a licensed graduate physician, or that:

2. Dr. Oesting was not generally qualified to practice the profession of medicine; or that:

3. Dr. Jordan was known either by reputation or service to any of the persons sought to be defrauded; or that

4. Any of said persons had ever previously been treated by Dr. Jordan; or

5. Believed that they were to be, or were being treated by Dr. Jordan; or that

6. None of said persons would have paid money to, or consented to be treated by Dr. Oesting instead if Dr. Jordan did not exist.

The fantasy of the accusation lies in the supposition that the public were to be fooled by the mere magic of a name: that Jordan was a more euphonious cognomen than Oesting and that, therefore, more people might be induced to put themselves under the treatment of Oesting, if he changed his name to Jordan. So far as the law's requirements are concerned, there are no degrees of qualification in any of the learned professions, one who is qualified to practice his profession is as much so qualified as another, however eminent he may have become; and so in this case, had Dr. Oesting been the most eminent and skillful member of the medical profession, giving to his patients the highest class of service and experience, he would be chargeable with fraud because he told his patients his name was Jordan. Fie, upon such a charge!

The Courts have time and again asserted that "medicine is far from being an exact science. Its diagnosis is but a guess enlightened sometimes by experience". Therefore incorrect diagnosis, even though made by a physician practicing under an assumed name, cannot alone constitute fraud, unless the patients knew of and believed in the skill of the

physician under whose name the service is being given, and were induced thereby to employ him.

No such claim is made in this prosecution; because it is admitted by the Government that no such person as Dr. Jordan existed. The elements of fraud are all lacking, because there can be no natural connection between the alleged scheme or artifice to defraud, existing solely in the mind of the accused, and the parting by any person, with money for medical services actually performed or medicines actually delivered, however impotent to perform a perfect cure. That the services were of *some* value and the medicine of *some* merit is admitted by the allegations of the indictment which merely charges that Dr. Oesting was "without any *proper* knowledge of the real condition" of the patients; and that the medicines were "of *little* value" for the cure. It was just as easy to have charged *no* knowledge on the part of the doctor and *no* value in the drug.

Had the Government intended to make such an accusation the indictment would have been drawn to meet it.

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94: The bill alleged that plaintiffs were a business corporation and its manager, and the defendant the postmaster in City of Nevada; that plaintiffs conducted a business of treating people afflicted with ills and with teaching the healing methods to others; that a large amount of such business consists of treatment by letter:

"And your orators state that said business is a legal and legitimate business * * * and is founded largely and almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the treating, curing, benefiting and remedying thereof.

"And that the human race does possess the innate power, through proper exercise of the faculty of the brain and mind, to largely control and remedy the ills that humanity is heir to, and plaintiffs discard and eliminate from their treatment what is commonly known as divine healing and Christian Science, and plaintiffs are confined to practical scientific treatment emanating from the source aforesaid."

That the postoffice made an order to the effect that the plaintiffs

"* * * are engaged in conducting a scheme or device for obtaining money by means of false and fraudulent pretenses, representations and promises, in violation of the act of Congress * * *",

and further forbidding the payment of postal orders and instructing the return to the senders of letters addressed to plaintiffs, the word "fraudulent", being first stamped on the letters.

It is Held:

"These allegations (as to plaintiffs' business) are statements of fact upon which, as averred, the business of the complainants is based, and the question is whether the complainants who are conducting the business upon the basis stated thereby obtain money and property through the mails by means of false or fraudulent pretenses, representations or promises.

Can such a business be properly pronounced a fraud within the statutes of the United States?" (page 103)

"There can be no doubt that the influence of the mind upon the physical condition of the body is very powerful, and that a hopeful mental state goes far in many cases, not only to alleviate, but even to aid very largely in the cure of an illness from which the body may suffer. And it is said that nature may itself, frequently, if not generally, heal the ills of the body without recourse to medicine, and that it cannot be doubted that in numerous cases nature when left to itself does succeed in curing many bodily ills. How far these claims may be borne out by actual experience may be matter of opinion. Just exactly to what extent the mental condition affects the body, no one can accurately and definitely say * * * *but surely it cannot be said that it is a fraud for one person to contend that the mind has an effect upon the body and its physical condition greater than even a vast majority of intelligent people might be willing to admit or believe.* Even intelligent people may and indeed do differ among themselves as to the extent of this mental effect. Because the complainants might or did claim to be able to effect cures by reason of working upon and affecting the mental powers * * * who can say that it is a fraud or a false pretense or promise within the meaning of these statutes? How can anyone lay down the limit and say beyond that there are fraud and false pretenses? The claim of the ability to cure may be vastly greater than most men would be ready to admit, and yet those who might deny the existence or virtue of the remedy would only differ in opinion from those who assert it. There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of complainants cannot be the

subject of proof as of an ordinary fact; it cannot be proved as a fact to be a fraud or false pretence of promise, nor can it properly be said that those who assume to heal bodily ills or infirmities by a resort to this method of cure are guilty of obtaining money under false pretenses, such as are intended in the statutes, which evidently do not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity. We may not believe in the efficacy of the treatment to the extent claimed by the complainants, and we may have no sympathy with them in such claims, and yet their effectiveness is but a matter of opinion in any court. * * * "

"Suppose a person should assert that by the use of electricity alone, he could treat diseases as efficaciously and successfully as the same have heretofore been treated by 'regular' physicians. Would these statutes justify the postmaster general, upon evidence satisfactory to him, to adjudge such claim to be without foundation and then to pronounce the person so claiming, to be guilty of procuring, by false or fraudulent pretenses, the moneys of people sending him money through the mails, and then to prohibit the delivery of any letters to him? The moderate application of electricity, it is strongly maintained, has great effect upon the human system, and just how far it may cure or mitigate diseases no one can tell with certainty. It is still in an empirical stage, and enthusiastic believers in it may regard it as entitled to a very high position in therapeutics, while many others may think it absolutely without value or potency in the cure of disease. Was this kind of question intended to be submitted for decision to a postmaster general, and was it intended that he might decide the

claim to be a fraud and enjoin the delivery of letters through the mail addressed to the person practising such treatment of disease? As the effectiveness of almost any particular method of treatment of diseases is, to a more or less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the postmaster general within these statutes relative to fraud. Unless the question may be reduced to one of fact as distinguished from mere opinion, we think these statutes cannot be invoked for the purpose of stopping the delivery of mail matter.

"Vaccination is believed by many to be a preventive of smallpox, while others regard it as unavailing for that purpose. Under these statutes could the postmaster general, upon evidence satisfactory to him, decide that it was not a preventative, and exclude from the mails all letters to one who practiced it and advertised it as a method of prevention, on the ground that the moneys he received through the mails were procured by false pretenses?

"Again, there are many persons who do not believe in the homeopathic school of medicine, and who think that such doctrine, if practised precisely upon the lines set forth by its originator is absolutely inefficacious in the treatment of diseases. Are homeopathic physicians subject to be proceeded against under these statutes and liable at the discretion of the postmaster general, upon evidence satisfactory to him, to be found guilty of obtaining money under false pretenses and their letters stamped as fraudulent and the money contained therein as payment for their professional services sent back to the writers of the letters?

And, turning the question around, can physicians of what is called the 'old school' be thus proceeded against? Both of these different schools of medicine have their followers, and many who believe in the one will pronounce the other wholly devoid of merit. But there is no precise standard by which to measure the claims of either, for people do recover who are treated according to the one or the other school. And so, it is said, do people recover who are treated under this mental theory? By reason of it? That cannot be averred as matter of fact. Many think they do. Others are of the contrary opinion. Is the postmaster general to decide the question under these statutes?

"Other instances might be adduced to illustrate the proposition that these statutes were not intended to cover any case of what the postmaster general might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion formed no basis.

"It may perhaps be urged that the instances above cited by way of illustration do not fairly represent the case now before us but the difference is one of degree only. It is a question of opinion in all the cases, and although we may think the opinion may be better founded and based upon a more intelligent and a longer experience in some cases than in others, yet after all it is in each case opinion only, and not existing facts with which these cases deal. There are, as the bill herein shows many believers in the truth of the claims set forth by complainants, and it is not possible to determine as a fact that those claims are so far unfounded as to justify a determination that those who maintain them and practice upon that basis obtain their money by false pretenses

within the meaning of these statutes. The opinions entertained cannot, like allegations of fact, be proved to be false, and therefore it cannot be proved as matter of fact that those who maintain them obtain their money by false pretenses or promises, as that phrase is generally understood and, as in our opinion, it is used in these statutes.

"That the complainants had a hearing before the Postmaster General, and that his decision was made after such hearing, cannot affect the case. The allegation in the bill as to the nature of the claim of complainants and upon what it is founded, is admitted by the demurrer, and we therefore have undisputed and admitted facts, which show upon what basis the treatment by complainants rests, and what is the nature and character of their business. From these admitted facts it is obvious that complainants in conducting their business, so far as this record shows, do not violate the laws of Congress. The statutes do not as matter of law cover the facts herein."

Harrison v. U. S., supra, shows the same rule to apply to a criminal prosecution for using the mails to defraud.

We have omitted any mention of the rule of law that prevents the building up of a crime by the aid of inference, implication and strained interpretation, but the remarks made as to fraud in connection with the accusations against Dr. Oesting, and the further remarks made in the foregoing pages regarding the attempt to make a mere unethical

practice of medicine seem a crime, call to mind the case Ex parte McNulty, 77 Cal. 164.

That was a petition for a writ of habeas corpus by a doctor who had been imprisoned for continuing to practice medicine after his license had been revoked for "unprofessional conduct" in advertising himself as a specialist in certain enumerated diseases. Held that the conduct of petitioner did not constitute a criminal offense:

> "* * * the only penal clause * * * in the act * * * is as follows: 'Any person practicing medicine or surgery in this state, without having first procured a certificate so to do from one of the board of examiners * * * shall be guilty of a misdemeanor. * * * Practicing after an order of the board revoking the certificate for 'unprofessional conduct' is not declared to be a crime, and no penalty is attached to it. Respondent's position really is, that the legislature must have intended such conduct to be a criminal offense. * * * It would certainly be a forced thing to imagine their intent to be that a man should lose his liberty for the violation of any vague, undefined notion of unprofessional conduct, which might, after the fact, be entertained by certain individuals constituting a board of examiners. * * * There is nothing there (in the act) that declares such conduct to be a criminal offense. * * * *Constructive crimes—crimes built up by the Courts with the aid of inference, implication and strained interpretation—are repugnant to the spirit and letter of English and American law.*"

Whether or not certain facts constitute fraud is a question of law, and although fraud is charged,

if the facts supposed to constitute fraud are fully set out and according to law they do not constitute fraud, then the allegation of fraud is negatived. The facts set out in the Oesting indictment negative fraud, unless we adopt "inference, implication and strained interpretation", which is repugnant to the letter and spirit of American law.

Dated, San Francisco,
April 6, 1916.

Respectfully submitted,

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